

RAMON GARCIA)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,053,638
)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

Claimant argues the ALJ's Order for Medical Treatment should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a custodian specialist working at the University of Kansas. On October 16, 2009, claimant was cleaning in a restroom stall standing two steps up on a stepladder when he slipped off the ladder landing on his feet. Although he thought his back and left shoulder impacted against the stall, the incident happened so fast claimant was unsure what parts of his body impacted against the stall. Claimant did not seek medical attention at that time.

Claimant testified that his back pain was more severe than his shoulder after the accident. But as claimant continued working he testified that his shoulder pain increased. On November 20, 2009, claimant went on his own to the emergency room at Lawrence Memorial Hospital because of back pain. X-rays were negative for fractures and claimant was diagnosed with low back pain and prescribed medication. Claimant was referred to the Occupational Medicine Clinic at the hospital. At the Occupational Medicine Clinic, claimant was seen by Dr. Chris Fevurly and his physician's assistant. Claimant was diagnosed with lumbar strain and prescribed physical therapy and later received lumbar epidural injections.

Claimant testified that every time he saw a doctor he would tell the doctor about his left shoulder complaints. From November 2009 through March 2010, claimant saw Dr. Fevurly approximately 10 times and there is no documentation in Dr. Fevurly's notes to indicate that claimant had mentioned his shoulder complaints. Claimant still insisted that he had told Dr. Fevurly about his shoulder complaints.

At his March 24, 2010 visit with Dr. Fevurly, claimant complained of left shoulder pain. Dr. Fevurly noted that was the first complaint of left shoulder pain during several months of claimant's treatment. Dr. Fevurly's medical note for March 24, 2010, provides in pertinent part:

He mentions his left shoulder today for what appears to be the first time in the last 4-6 months. He states that he injured his left shoulder when he had the fall that occurred back on October 16, 2009. I have gone back through all of my records, and I cannot see any mention of this left shoulder pain in the past, but he has discomfort in the left shoulder with forward reach or overhead reach.¹

At the next visit with Dr. Fevurly on April 19, 2010, the doctor noted that claimant made no mention of left shoulder pain and when asked if he had any other complaints of pain

¹ P.H. Trans. (Jul. 29, 2011), Resp. Ex. A., Fevurly.

besides his back, the claimant said no. On June 11, 2010, Dr. Fevurly released claimant from treatment for his low back and again noted there was no support in the medical records for claimant's assertion he injured his left shoulder on October 16, 2009.

In May 2010 claimant was referred to Dr. James Zarr for a surgical consult regarding his lumbar spine and there was no mention made of any left shoulder problems or complaints.² Claimant was released from treatment but then sought medical treatment on his own and later had back surgery performed by Dr. Ebeling. The surgery was paid for by claimant's own health insurance.

On February 15, 2011, a preliminary hearing was scheduled on claimant's request for medical treatment for his left shoulder. At the preliminary hearing, the parties agreed to send claimant to a doctor at Dickson-Diveley for an IME to determine the issue of causation and need for medical treatment regarding claimant's shoulder complaints. Ultimately, the parties agreed for Dr. Brian Divelbiss to perform the medical examination of claimant's left shoulder to address the issue of causation and need for treatment.

Dr. Divelbiss, in his report dated May 26, 2011, diagnosed claimant with left shoulder impingement syndrome with possible labral pathology. But Dr. Divelbiss concluded there was no evidence to support the contention that the left shoulder condition was related to the October 16, 2009 accident at work. The doctor noted in his May 26, 2010 report in pertinent part:

The very first documented note of any issue involving his left shoulder was not until a March 24, 2010, visit in the pain management clinic at Lawrence Memorial Hospital where the patient shaded in the left shoulder as a place where he was having pain. In addition on that same date he saw Doctor Fevurly who noted a first report of left shoulder pain allegedly secondary to the fall from a ladder six months previous to that date. From the note of June 11, 2010, when Doctor Fevurly released Mister Garcia he felt that there was no support for the patient's claim that his left shoulder was injured as a result of the fall given the interval time period between injury date and first documented notation of left shoulder pain.

At this time I find no documented evidence to support the contention that the left shoulder pain was related to the work related injury based on the medical documentation.³

The claimant scheduled a second preliminary hearing and after the preliminary hearing on July 29, 2011, the ALJ ordered Dr. Pat Do to conduct an examination of claimant. Dr. Do concluded claimant might have an impingement, possible rotator cuff

² P.H. Trans. (Jul. 29, 2011), Resp. Ex. A., Zarr.

³ Id., Resp. Ex. A.

pathology, or some underlying wear and tear of his left shoulder. And Dr. Do noted claimant's need for left shoulder treatment was causally related to the October 16, 2009 incident if claimant had shoulder pain ever since the fall. In his October 10, 2011 report, Dr. Do noted in pertinent part:

If you believe Mr. Garcia's history that he has had left shoulder pain ever since his fall and while working he continued to have left shoulder pain even from his activities at work then I think within a reasonable degree of medical probability, his need for left shoulder treatment is causally related to his described work injury.⁴

The ALJ then issued the Order for Medical Treatment dated October 24, 2011.

The claimant alleged he had shoulder pain immediately after the incident at work on October 16, 2009. And as he continued working he experienced pain in his shoulder. Claimant did not seek medical treatment until a little over a month later and testified that he told all the medical providers that he not only injured his low back but also injured his left shoulder.

But the contemporaneous medical records simply do not corroborate claimant's version of events. The medical records indicate complaints of low back pain but no mention is made of shoulder problems. There were numerous opportunities for claimant to voice a complaint or request treatment for his shoulder but the medical records do not contain any mention of his shoulder until over 5 months after the incident at work. And it is telling that when he complained of left shoulder problems, that comment was noted in the doctor's records. Moreover, at the next office visit the shoulder was not mentioned and claimant responded in the negative to a question regarding whether he had any other complaints besides his low back. It is difficult to accept claimant's assertion that he was telling all the medical providers about his left shoulder but no one recorded his complaints. And claimant agreed no medical provider told him that they were not authorized to treat his shoulder.⁵

This Board Member finds in this instance the medical records corroborate Drs. Divelbiss and Fevurly's opinions that claimant did not suffer accidental injury to his left shoulder as a result of the October 16, 2009, incident at work. Consequently, the ALJ's Order for Medical Treatment is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this

⁴ Dr. Do's IME filed October 21, 2011.

⁵ P.H. Trans. (Jul. 29, 2011) at 15-16.

⁶ K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated October 24, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Stephanie J. Wilson, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁷ K.S.A. 2010 Supp. 44-555c(k).

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAMON GARCIA)	
Claimant)	
)	
VS.)	
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ORDER NUNC PRO TUNC

The Board entered an Order in the above-captioned matter dated December 12, 2011. The Board finds the date was incorrect on the Order and the correct date should be January 12, 2012.

WHEREFORE, it is the finding, decision, and order of the Board that the date of the Board's Order entered in the above-captioned matter should be January 12, 2012.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

BOARD MEMBER

c: Stephanie J. Wilson, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge